In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1020

STATE OF NEBRASKA, ET AL., PETITIONERS

v.

CASPAR W. WEINBERGER,
SECRETARY OF HEALTH, EDUCATION, AND WELFARE,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioners brought this action in the United States District Court for the District of Nebraska pursuant to 42 U.S.C. 418(t) for review of the correctness of assessments made by the Social Security Administration against the State of Nebraska for $165.88 in social security contributions with respect to the earnings of Clayton R. Ward, a justice of the peace in the City of Columbus, for the period January 1, 1953, through September 13, 1960, and for $190.49 with respect to the earnings of Lewis W. Ross, a constable in the City of Lincoln, for the period January 1, 1951, through September 13, 1960. The State's obligation was based on an agreement entered into pursuant to 42 U.S.C. 418 between the Secretary of Health, Education, and Welfare and the State, whereby

the State undertook to pay the social security taxes on the earnings of its employees and officers and the employees and officers of designated political subdivisions of the State. The sole question presented here is whether justices of the peace and constables are "employees" within the meaning of the agreement.[1]

The district court noted that the offices of justice of the peace and constable were created and are defined either by the State constitution or by State statutes. On the basis of this fact and the other evidence of record, the court held that justices of the peace and constables are officers of the State and thus "employees" within the meaning of the agreement; accordingly, the court upheld the Social Security Administration's assessments (Pet. App. 25-27, 31-32). The court of appeals affirmed (Pet. App. 19-20).

2. The courts below correctly concluded that justices of the peace and constables are officers of the State; review by this Court is thus unwarranted. Contrary to petitioners' contention (Pet. 12-14), the decision below does not conflict with *United States* v. *Webb*, 397 U.S. 179. *Webb* involved the meaning of the term "employee" as applied to the private sector of the economy; it is not controlling for determining whether public officials are "officers" of a State for social security purposes.

Finally, this case is of limited prospective importance since the agreement between the Secretary and the State was modified in 1961 to exclude justices of the peace and constables from coverage under the agreement.

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[1]The agreement provided (Pet. App. 36):

> For the purposes of this agreement * * * the term "employee" shall * * * include an officer of the State or of a political subdivision thereof.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1973.